Supreme Court, U.S.
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NO. 84-1992

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ALFRED GREEN, JR.,
Petitioner

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

EDWIN LLOYD PITTMAN,
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
SPECIAL ASSISTANT
ATTORNEY GENERAL
(Counsel of Record)

Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

Attorneys for Respondent

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28 pp

QUESTION PRESENTED

1. There being sufficient facts to establish probable cause for the issuance of the arrest warrant the "Sweep Search" of Petitioner's apartment incident to that arrest was therefore valid and certiorari should be denied.

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED---------- i

TABLE OF CONTENTS---------- ii

TABLE OF AUTHORITIES---------- iii-iv

OPINION BELOW---------- 1

JURISDICTION---------- 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED---------- 2

STATEMENT OF THE CASE---------- 3-4

REASONS FOR DENYING THE WRIT-------- 4-21

I. There being sufficient facts to establish probable cause for the issuance of the arrest warrant the "sweep search" of Petitioner's apartment incident to that arrest was therefore valid and certiorari should be denied.----------4

CONCLUSION----------22

CERTIFICATE OF SERVICE----------23

TABLE OF AUTHORITIES

CASES:	PAGE:
Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)	9, 10
Chirstofferson v. State, 443 P.2d 815 (Wash. 1968), cert. denied, 393 U.S. 1090, 89 S.Ct. 855, 21 L.Ed.2d 783 (1969)	8
Hester v. State, 463 So.2d 1097 (1985)	8
Hudson v. State 382 So.2d 479 (Miss. 1980), cert. denied, 449 U.S. 1016, 66 L.Ed.2d 475, 101 S.Ct. 576 (1980)	7
Joyce v. State, 327 So.2d 225 (Miss. 1976)	12
Lee v. State, 435 So.2d 674 (Miss. 1983)	8
Meyer v. State, 309 So.2d 161 (Miss. 1975)	12
Prueitt v. State, 261 So.2d 119 (Miss. 1972)	7
Read v. State, 430 So.2d 832 (Miss. 1983)	8

TABLE OF AUTHORITIES - Continued

Page:

United States v. Sheikh, 654 F.2d 1057, 1071 (5th Cir. 1981), cert. denied. 455 U.S. 991, 102 S.Ct. 1617, 71 L.Ed. 2d 852 (1982)---------- 21

United States v. Ventresca, 380 U.S. 102 (1965)---------- 8

Wilborn v. State, 394 So.2d 1355 (Miss. 1981)---------- 8

CODES AND STATUTES:

28 U.S.C. § 1257(3)---------- 2

OTHER:

Fourth Amendment, U.S. Constitution---------- 2

Fourteenth Amendment, U.S. Constitution---------- 2

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PETITION FOR WRIT OF CERTIORARI TO THE
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BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of the State of Mississippi is reported as Green v. State, 465

So.2d 999 (Miss. 1985) (not designated for publication). A copy of this unpublished opinion is found as an Appendix to the Petition for Writ of Certiorari. A timely petition for rehearing was filed and denied without opinion on April 10, 1985.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. §1257(3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments Four and Fourteen.

STATEMENT OF THE CASE

The Petitioner, Alfred Green, Jr., was indicted by a grand jury of the Circuit Court of Hinds County, Mississippi, First Judicial District, during the November 1981 Term for the crime of Possession of more than a kilogram of marijuana. Petitioner was tried on the indictment during the February 1983 Term of said Court. After hearing all the evidence and deliberating thereon the jury returned a verdict of guilty as charged. Thereupon, the trial court sentenced Appellant to serve a term of twenty (20) years in the custody of the Mississippi Department of Corrections. Petitioner appealed his conviction to the Mississippi Supreme Court. On February 20, 1985, the Mississippi court affirmed the conviction and sentence. On April 10, 1985, Petitioner's petition for rehearing was denied by the court below. Petitioner was released on $50,000.00 bond pending the outcome of this petition.

The facts that gave rise to this conviction and the basis of Petitioner's complaint are fully and accurately set out the opinion of the court below. These facts can be found in the copy of the opinion appended to the petition in this case on page A2-A10.

REASONS FOR DENYING THE WRIT

I. THERE BEING SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE FOR THE ISSUANCE OF THE ARREST WARRANT THE "SWEEP SEARCH" OF PETITIONER'S APARTMENT INCIDENT TO THAT ARREST WAS THEREFORE VALID AND CERTIORARI SHOULD BE DENIED.

The issue Petitioner raises concerning issuance of the arrest warrant here is one of fact and interpretation placed on those facts by the court below. Petitioner contends that the Mississippi Supreme Court misread the record of the proceedings below and that by this misreading has incorrectly

affirmed the denial of his motion to suppress the marijuana located in the bedroom of his apartment.

In the court below the Petitioner based his argument primarily on the fact that the affidavit in support of the search warrant furnished the issuing magistrate, Judge Shanks, was insufficient to establish probable cause for arrest. Petitioner further argued that by invalidating the arrest warrant the protective sweep search of his apartment made incident to his arrest on that warrant was invalidated. If the sweep search is held invalid, the Petitioner then contends that the marijuana found in his bedroom is suppressible and his conviction for possession of that marijuana should be vacated.

As stated above, the major contention made by Petitioner and addressed by the court below was whether or not there was probable cause to issue the arrest warrant. The Mississippi court stated:

IV.

DID THE TRIAL COURT ERR IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE ON THE BASIS OF AN ILLEGAL ARREST?

> Appellant contends that the arrest warrant issued to Agent Turner was not based upon probable cause and that the marijuana seized as a result of his arrest is inadmissible as fruit of the poisonous tree. Appellant contends that the affidavit submitted to the magistrate did not contain sufficient information to support an independent judgment of probable cause. Green states that the fact that Turner's oral testimony was not incorporated in the affidavit renders it insufficient to support probable cause. Further, Green contends that Turner did not have a reliable source of information which linked Green to the cocaine sale on July 15, 1981.

In Wilborn v. State, 394 So.2d 1355, 1357 (Miss. 1981), this Court held that affidavits not sufficient on their face may be supplemented by sworn oral testimony to establish sufficient facts to show probable cause. In this case, as in Wilborn, the written affidavit contained a conclusory statement that the defendant had violated a controlled substances law. This Court allowed police testimony to supply all of the facts and circumstances to establish probable cause. See Dissent, 394 So.2d at 1358-59.

Examining the testimony presented to Judge Shanks, he was faced with the following facts: A co-conspirator in a cocaine sale stated that his accomplice

obtained the cocaine from Green. Turner's personal observations partially corroborated Green's presence in the building at the time of the cocaine sale. Further, the co-conspirator elicited statements from a friend of the defendant, who acknowledged that the defendant had sold the cocaine. Finally, the person from whom the cocaine was purchased went to Green's apartment empty-handed and returned with the cocaine. Based upon these facts, we find that the trial judge was presented with sufficient evidence from which to conclude that there was probable cause for an arrest warrant for Green.

Green's contention, insofar as it attacks the insufficiency of the written affidavit, is without merit in light of Wilborn v. State, supra. In considering the facts and circumstances presented to Judge Shanks, we find that he had sufficient reasonable trustworthy information to justify the belief that Green had participated in the cocaine sale. Therefore, we affirm the trial judge's action in overruling Green's motion to suppress.

Petiton at A21-A24.

It is clear that the established law in Mississippi does not require that all facts and circumstances in support of the issuance of a search warrant appear on the face of the affidavit. Pruiett v. State, 261 So.2d 119 (Miss. 1972); Hudson

v. State, 382 So.2d 479 (Miss. 1980), cert. denied, 449 U.S. 1016, 66 L.Ed.2d 475, 101 S.Ct. 576 (1980); Wilborn v. State, 394 So.2d 1355(Miss. 1981); Read v. State, 430 So.2d 832 (Miss. 1983); Lee v. State, 435 So.2d 674 (Miss. 1983); Hester v. State, 463 So.2d 1097 (1985). See also: Chirstofferson v. State, 443 P.2d 815 (Wash. 1968), cert. denied, 393 U.S. 1090, 89 S.Ct. 855, 21 L.Ed.2d 783 (1969). The sworn oral testimony presented to the issuing magistrate was sufficient to base a finding of probable cause for issuance of an arrest warrant. The decision below gave full consideration to the issue of probable cause and decided it correctly.

The following frequently cited quote from United States v. Ventresca, 380 U.S. 102 (1965), echoes the philosophy permeating the opinions of the Supreme Court on the spirit in which applications for warrants must be reviewed:

> These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the

> Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

The same philosophy is represented by Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), in which the Court pointed out that the preference for warrants is so marked, that less persuasive evidence will justify the issuance of a warrant than would justify a warrantless search or arrest.

> Thus, when a search is based upon a magistrate's rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant, ibid.; and will sustain the judicial determination so long as there was substantial basis for the [magistrate] to conclude the narcotics were probably present.
>
> 378 U.S. at 111.

This preference was reiterated in Ventresca, supra:

> However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.
>
> 380 U.S. at 109.

The Mississippi Supreme Court follows the wise mandate of these cases in judging the sufficiency of probable cause urged in support of an application for a search warrant or arrest warrant as is noted by the decision in Hester v. State, supra, where it stated:

> Although this case involves named witnesses, not confidential informants, we deem it significant to recall the analysis in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), quoted in Lee v. State, 435 So.2d at 676:

> [T]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ...concluding that probable cause existed...
>
> ...

In conclusion, we find that, from the oral testimony supplementing the affidavit, even admitting the discrepancies asserted by Hester, Judge Blaine was presented with sufficient reliable facts to support a determination of probable cause for the issuance of the search warrant.

In Pow v. State, 235 So.2d 920 (Miss. 1970), we said that probable cause exists when the ...available evidence makes it reasonable to infer that the particular person not necessarily was, but may have been one of the offenders,....

It is clear therefore, that "probable cause" means less than the evidence which would justify condemnation (Carroll v. United States, supra [267 U.S. 132, 45

S.Ct. 280, 69 L.Ed. 543 (1925)]), but more than bare suspicion. Locke v. United States, 11 U.S. (7 Cranch) 339 (1813), 3 L.Ed. 364.

463 So.2d at 1090.

SEE: Joyce v. State, 327 So.2d 225 (Miss. 1976) and Meyer v. State, 309 So.2d 161 (Miss. 1975).

Petitioner's argument on the issue of probable cause does violence to these principles where it seeks to judge the affidavit and accompanying sworn testimony in a hypertechnical rather than common sense manner. Subjected to the proper degree of judicial scrutiny, the court below correctly found that there was sufficient probable cause to believe that Petitioner was involved in the conspiracy to sell cocaine and thereafter issue a warrant for his arrest.

It will be enlightening for the Court to read the actual words from Agent Turner found at pages 18-22 of the transcript of the state court trial:

BY MR. FRAZIER:

Q. Now, other than this affidavit, what other information did Judge Shanks

have as to what you were swearing to in this affidavit?

A. I testified under oath during the preliminary hearing that day in the presence of Judge Shanks as to the facts and circumstances surrounding the seizure of approximately one-half ounce of cocaine from Bernard Ross and Percy L. Clay which occurred in Madison County on July 15th, 1981.

Q. Okay. Could you tell the Court precisely what you testified to on that date that Judge Shanks heard it?

A. On July 15th, 1981, I received information through a confidential informer, who stated that Bernard Ross had approximately one-half ounce of cocaine that he would sell for $1,200.00. Through the informant we arranged for the informant to meet with Bernard Ross in the parking lot of the Pizza Hut Restaurant located in Madison, Mississippi, at the corner of Old Canton Road and County Line Road, around 5:00 or 5:30 that afternoon. I placed a listening device on the informant, searched the informant's person and vehicle to determine if he had any control substances located there, which he did not. But through this listening device, I also had the capability of recording any conversation he had with any person. At around 5:30, I observed the informant meet with Bernard Ross at the Pizza Hut parking lot. During this conversation which he had with Ross, Ross stated that he did not have the one-half ounce of cocaine, that he would travel to a residence near Briarwood Drive in Jackson, Hinds County, Mississippi, and obtain a half ounce of cocaine and bring his half an ounce along with his source

back to the Pizza Hut shortly and deliver this cocaine to the informant for the negotiated price of $1200.00. Well, at this time, I along with other bureau agents, surveilled Bernard Ross to the Residence Apartments located on Old Canton Road in Hinds County. There I observed Ross' vehicle parked near buildings A and B of the Residence Apartments. At this point, we do not know who Ross' source was for the cocaine. As I drove through the parking lot, I observed Ross' vehicle there and tried to determine if I could tell the source from which this cocaine would be coming from. I observed a subject standing in the doorway of building A on the top left-hand side of the building. This subject was later identified to be Percy Clay as I recognized. Approximately 20 minutes later after Ross had arrived at the apartment, I travelled back through the apartment complex drive-thru [sic], observed a red Thunderbird vehicle, Ford Thunderbird, parked in the parking lot. I ran a tag registration and determined that the vehicle was registered to Alfred Green at the Residence Apartments, in Jackson, Mississippi, at that address. At this time approximately 10 minutes later, we observed Bernard Ross and another individual, later identified to be Percy Clay, travel from the Residence Apartments to the Pizza Hut parking lot where they delivered a sample of cocaine to a confidential informant we had at the restaurant. The informant delivered this sample to an agent, who was inside the Pizza Hut, who obtained a field test on the substance which we obtained positive results. Ross and Clay were then arrested.

Search incident to this arrest, revealed half an ounce of cocaine on the person of Bernard Ross. We advised all these subjects of their rights, which they stated they understood. Bernard Ross then gave a statement in the presence of myself and Agent Sandy Norton to the effect that he had been in touch with my informant that day, and had agreed to sell him a half an ounce of cocaine for $1200.00, which he did not have, but stated that a person by the name of Percy Clay could obtain this cocaine for him. He went to his residence. Clay stated that he did not have the cocaine at this time and that he was waiting for a person by the name of Alfred Green to arrive, and that was who he was going to obtain cocaine from. He stated when Green arrived, Clay went to Green's apartment, returned and had in his possession a half an ounce of cocaine, which was seized at the restaurant. He stated that Green, through Clay, wanted $1100.00 for this cocaine and Clay stated that he had, in fact, gotten the cocaine from Green. He gave a physical description of Green, which later proved to be reliable, and we substantiated that this was, in fact, a true description of Green. He gave us a description of Green's vehicle, which we verified as being true. He gave us a -- the location of Green's apartment where he lived. We verified that was true. Later on July 16, 1981, I again placed a recording or transmitting device on Bernard Ross this time and instructed him to go to the apartment of Percy Clay. Percy Clay at this time was in jail, but he was going to go there to see if we could obtain any more evidence concerning

Al Green. He went there and met with a female only known to us as C.C., who was Percy Clay's roommate. During the conversation, I overheard her and Bernard Ross, her specifically stating that that was a lot of money that supposedly Ross owed Clay, who owed Green $1100.00. She made the statement, "That's a lot of money." She said that she would talk to Al for him if he wanted to. She said that his car was there, so he ought to be there. We verified that that was true, because his car was outside the apartment. As the informant was leaving the apartment, he told us through the microphone he had on him that Al Green and his girlfriend were leaving the apartment now, getting in their car and leaving. We verified that as being true, also, as we followed Green for several blocks from his apartment.

Q. So what you're saying is several of these things that these people were telling you, you observed yourself; and verified them to be true, is that correct?

A. Yes, sir.

Q. Were any of these people that told you these things, could they possibly have been charged with something themselves?

A. Yes, sir. Bernard Ross, the statements that he made, he was a co-conspirator in this case.

Q. Was he aware that he could have been charged?

A. Yes, sir. He understood that what he told us could be used against him. He was made no promises at all at this time.

Q. Was Judge Shanks made aware of these verifying aspects?

A. Yes, sir.

Q. How specifically was he made aware, other than the testimony that he heard in the hearing, was there any other form or fashion?

A. Just the testimony concerning all the aspects of this particular incident.

Q. Okay.

A. Orally.

Q. So other than the affidavit and the testimony that you gave at the preliminary hearing, he heard nothing else, is that correct?

A. He heard nothing else. One other thing as far as statements go, after Percy Clay had been advised of his rights, on the way to the jail he made the statement that he was only trying to help a friend, which led me to believe that what Ross had said was true concerning his helping Ross get the cocaine which he supposedly got for him from Green.

[Emphasis added] Tr. 18-22.

On cross-examination we find the following colloquy:

BY MR. JOHNSON:

Q. -- Okay. Now, that conversation that you're talking about between Bernard Ross' wife and -- I mean between Percy Clay's wife and Bernard Ross, in that conversation, does Percy Clay's wife or Bernard Ross identify anybody by the name of Alfred Green?

A. No, it's Al.

Q. You don't know what Al they're talking about. At best, you'd have to guess or speculate as to whether it was Alfred Green or not?

A. They--

Q. -- They didn't say Green?

A. They didn't say Green; however, she did say his car was parked outside and at that time Alfred Green's car was parked outside.

Tr. 26.

Agent Turner admitted that the information he had concerning Green's involvement came mainly from Bernard Ross and Percy Clay's girlfriend, C.C. Green's name was used by both as the source of the cocaine. Ross and Clay sat in Clay's apartment for thirty minutes awaiting the arrival of the source of the cocaine, only when Petitioner's car appeared in the parking lot of the apartment house did Clay

leave his apartment and return with the cocaine. Clay told Ross that Green was the supplier of the cocaine. The fact that Green's last name was not mentioned by C.C. in the conversation with Ross is not important as she was clearly talking about Petitioner by reference to his car being parked outside. There was sufficient evidence presented to Judge Shanks to form a substantial basis for concluding that probable cause existed for the issuance of the search warrant in this case.

The issue of probable cause as presented in the petition is simply one of applying the facts and circumstances presented to the magistrate and determining if they are sufficient to pass muster under familiar Fourth Amendment law. Nothing has been shown by Petitioner to warrant a reexamination of these settled principles. Neither the facts nor the legal issues involved are complex, but they simply represent the normal grist for the state criminal courts system's mill. The issue has not been passed upon by eleven state court judges and

they have unanimously found the existence of probable cause. The impact of a decision on this issue will not extend beyond the present litigants. The issue as presented simply does not present a substantial federal question requiring this Court's valuable attention and time.

Having shown that sufficient probable cause existed for the issuance of the arrest warrant, the issue of the protective sweep search incident to that arrest is no longer viable. Even if it were the sweep search was not over intrusive and the officers had articulable reasons for feeling that someone else may be in the apartment other than Petitioner. When the officers approached Green's apartment they heard loud music. The agents knocked on the door repeatedly and no one answered. They knocked louder and approximately one minute later Petitioner came to the door. Green answered the door, the officers identified themselves and told him of their purpose. He allowed them inside the apartment. He asked if there was a warrant and was

shown the same. The loud music was still playing. Because of the loud music and the length of time between the knock on the door when it was answered, they felt someone else may be in the apartment. Lieutenant Berry and Agent Norton made a sweep of the apartment. They returned in seconds. Lieutenant Berry stated that in the first room to the right as you go down the hall, there was a trunk with five (5) large bags of leafy vegetable-like substancewhich he believed to be marijuana on the floor next to it in plain view. This search was clearly justified as the times when they had seen Petitioner in his apartment, he had his girlfriend with him. They did not know whether or not she or anyone else was present at the time of the arrest until the protective sweep was conducted. Under the ruling in United States v. Sheikh, 654 F.2d 1057, 1071 (5th Cir. 1981), cert. denied, 455 U.S. 991, 102 S.Ct. 1617, 71 L.ed.2d 852 (1982), the protective sweep was fully justified even if there was an issue of the search.

CONCLUSION

For the above and foregoing reasons, certiorari should be denied in this case.

Respectfully submitted,

EDWIN LLLOYD PITTMAN
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD

BY: Marvin L. White, Jr.
MARVIN L. WHITE, JR.

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 392095
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Special Assistant Attorney General, do hereby certify that I have this day caused to be mailed via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing **Brief In Opposition** to the Petition for Writ of Certiorari in this case to:

Russel D. Moore III, Amy D. Whitten, and Matthew M. Moore, Post Office Box 864, Jackson, Mississippi 39205.

This the 17th day of October, 1985.

Marvin L. White, Jr.
MARVIN. L. WHITE, JR.